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No. 759

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

INTERTYPE COMPANY, A DIVISION OF HARRIS-INTERTYPE CORPORATION,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

KENNETH C. MCGUINESS
1750 Pennsylvania Ave., N. W.
Washington, D. C. 20006

FLOURNOY L. LARGENT, JR.
25 East Boscawen Street
Winchester, Virginia 22601

Counsel for Petitioner,
Intertype Company, A Division
of Harris-Intertype Corporation

Of Counsel:

VEDDER, PRICE, KAUFMAN;
KAMMHOLZ & MCGUINESS
1750 Pennsylvania Ave., N. W.
Washington, D. C. 20006

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Intertype Company, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on August 23, 1968.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 15-23) is not officially reported as yet. The Board's Decision and Order (App. B, *infra*, pp. 26-36; J.A. 131-141)[1] is reported at 164 NLRB No. 108; its underlying decision (App. C and D, *infra*, pp. 37-50; J.A. 61-73, 97) in the representation proceeding is not officially reported.

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[1] "J.A." refers to the joint appendix filed in the court below.

JURISDICTION

The decree of the court of appeals was entered on August 23, 1968 (App. A, *infra*, pp. 24-25). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below applied an erroneous standard of judicial review in enforcing the Board's finding that a representation election was held under circumstances which enabled the employees to make a free choice of representatives.

2. Whether the court below erred in affirming the Board's refusal to produce statements which the Board relied upon in its decision and which Petitioner requested for inspection for the purpose of impeachment.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are printed in App. E, *infra*, pp. 51-53.

STATEMENT OF THE CASE

A. The Board's Decision and Order

1. *The Representation Proceeding.* On March 14, 1966, the Union [2] filed with the Board a petition for representation among Petitioner's production and maintenance employees (J.A. 13). On June 21, 1966, the Board conducted an election in the appropriate unit; the Union received 111 votes, 91 votes were cast against the Union, and 5 ballots were challenged (J.A. 54).

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[2] International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO.

Petitioner filed timely objections to conduct affecting the results of the election, and presented evidence to the Board, in the form of statements and affidavits, in support of its objections (J.A. 68-71, 56-58). The Board (by its Regional Director) conducted an *ex parte* administrative investigation into the objections and overruled the objections on the basis of the investigation without the benefit of a hearing (App. C, *infra*, pp. 37-49; J.A. 61-77). Petitioner filed a Request for Review (J.A. 77-96) with the Board, but the Board denied the request on the ground that "no substantial issues warranting review" were raised (App. D, *infra*, p. 50; J.A. 97). The objections and the Board's rulings thereon are set forth below.

(a) Petitioner objected that on election eve the Union issued a handbill which informed the employees that their vote would be "the most important decision you will make in your Intertype future" (J.A. 60). The leaflet continued (*ibid.*):

> The decision you will be making is a simple one. "Who will decide your future—YOU OR YOUR BOSS?"
>
> The results of your decision will not be so simple. Vote "no" and you will give up the only chance you may ever have to vote on your future.

Petitioner contended that the leaflet materially misrepresented the importance of the election, for it was not the "only chance" the employees might have to vote since another election could be held as soon as 12 months *after* a "no" vote (Section 9(c)(3)). Since the leaflet was timed so that Petitioner had no opportunity to reply, Petitioner urged that the election should be set aside because of the likelihood that the leaflet's misrepresentation had affected the outcome of the election (App. C, *infra*, pp. 42-43; J.A. 64-67).

The Board found the leaflet made no misrepresentation. It concluded that

> the use of the word "may" clearly indicates that a future chance to vote is entirely possible even if the employes were to vote "no" in the coming election. Also, it is noted that another election would not be a certainty if the [Union] lost. Prior to an election being held a union has to engage in a campaign, secure sufficient authorizations and then file a petition. Accordingly, this portion of the objection is overruled (App. C, *infra*, pp. 42-43; J.A. 67).

(b) Petitioner objected that on the day of the election Union adherents had circulated a false rumor that a highly respected supervisor, Ed Batch, had made comments favoring the Union or threatening reprisals by the company if the Union failed to get in (J.A. 56). Petitioner presented affidavits of three employees who stated that they were informed that Batch had told employees that the company "would make it rough" on the employees if the Union did not get in (App. C, *infra*, pp. 44-45; J.A. 67-69). Petitioner contended that the false statements attributed to such a respected official, and timed so as to prevent a reply, materially affected the outcome of the election (J.A. 56).

The Board concluded that the false rumor had not interfered with the election. Solely from its *ex parte* investigation, the Board found that employee Gordon Davis heard the false rumor from an employee and then told four other employees that Batch had said the company "would make it 'rough' on employees regardless of the outcome of the election" (App. C, *infra*, pp. 45-46; J.A. 70-71). The Board concluded that this statement was insufficient to affect the outcome of the election. Moreover, the Board found that Davis, although a Union adherent, was not an official of the Union, and that therefore the Union was not responsible for his conduct (App. C, *infra*, p. 46; J.A. 69-71).[3]

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[3] Davis admitted that he spoke to some employees about the Union and solicited an employee to sign an authorization card. Davis and the Union denied that Davis was on the Union's organizing committee (App. C, *infra*, pp. 45-46; J.A. 69-70).

Accordingly, the Board rejected Petitioner's objections to the election and certified the Union as bargaining representative of the employees in the unit (App. C, *infra*, pp. 46-47; J.A. 73).

2. *The Unfair Labor Practice Proceeding.* On September 21, 1966, Petitioner notified the Union that it would refuse to bargain because it believed that the Board had improperly certified the Union and that "the sole method of obtaining Court review of the Board's action is through a technical refusal to bargain" (App. B, *infra*, pp. 28-29; J.A. 100-101). On October 12, 1966, the Board issued an unfair labor practice complaint against Petitioner (App. B, *infra*, pp. 28-29; J.A. 1-5).

Prior to the hearing on the complaint, Petitioner requested the Board to furnish it with a copy of all reports compiled in the administrative investigation conducted in the representation proceeding so that such reports could be made a part of the record under Section 9(d) of the Act (App. B, *infra*, p. 29; J.A. 102-103). The request was denied (App. B, *infra*, p. 29; J.A. 107-109).[4] Thereafter, Petitioner subpoened these reports and also served a subpoena duces tecum on the Union, directing it to produce the list of names of the Union's In-Plant Organizing Committee. Both the Board and the Union filed petitions to revoke the subpoenas, and at the hearing the Trial Examiner granted these petitions and quashed the subpoenas, finding them irrelevant to the issues involved in the case (App. B, *infra*, pp. 29-31; J.A. 105-106, 111-119).

As to the merits, the Examiner found that, absent newly discovered evidence, Board law foreclosed reconsideration of issues raised in the representation proceeding. Finding no newly discovered evidence relevant to

[4] Petitioner brought an action in a federal district court to compel the production of the reports, but the court dismissed for want of jurisdiction. *Intertype Co.* v. *Penello*, 260 F. Supp. 573 (W.D. Va. 1967).

those issues, the Examiner affirmed the Board's certification of the Union (App. B, *infra*, p. 29; J.A. 132).[5] He therefore concluded that the Petitioner's refusal to bargain with the Union violated Section 8(a)(5) of the Act, and ordered the Petitioner to cease and desist from such conduct and to bargain with the Union upon request (App. B, *infra*, pp. 33-36; J.A. 137-138).

The Board, after timely exceptions, adopted the "findings, conclusions, and recommendations of the Trial Examiner" in their entirety (App. B, *infra*, pp. 26-27; J.A. 140).

B. The Decision of the Court of Appeals

In seeking review of the Board's decision in the court of appeals, Petitioner sought, by motion to the court, to require the Board to include the complete record of the administrative investigation in the transcript of record before the court. In particular, Petitioner sought the inclusion of all affidavits and statements of witnesses received by the Board during the administrative investigation into the objections to the election and relied upon by the Board in its rulings on the objections. On December 19, 1967, the court of appeals denied the motion without prejudice to Petitioner's right to urge the point when the case was heard on the merits (J.A. 142-147).

After argument on the merits, the court of appeals enforced the Board's order in full (App. A, *infra*, pp. 15-23). The court found that the Board had properly quashed the subpoena served on the Board because "investigative files are confidential and privileged against disclosure" except for "limited purposes when a hearing is required", and that Petitioner had "failed to establish its right to a hearing" (App. A, *infra*, p. 20).

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[5] New evidence which was presented by Petitioner in the unfair labor practice proceeding is not relevant here (App. B, *infra*, pp. 31-33; J.A. 135-136).

The court also rejected Petitioner's attack upon the validity of the election: (1) it concluded that the Board had not abused its discretion in finding the Union's leaflet to be "no justification for upsetting the election results" (App. A, *infra*, p. 21); (2) and it upheld the Board's ruling on the false rumor because "evaluation of the probable effect of the comment, in light of the totality of circumstances surrounding the election, is a function of the Board" (App. A, *infra*, pp. 21-22).

REASONS FOR GRANTING THE WRIT

1. In affirming the Board's determination that the election was held under circumstances free from misconduct which interfered with the employees' free choice, the court of appeals applied an erroneous standard of review contrary to that articulated in election-determination cases in other circuits. *Celanese Corp. of America* v. *National Labor Relations Board*, 291 F.2d 224, 225 (7th Cir. 1961), *certiorari denied*, 368 U.S. 925; *National Labor Relations Board* v. *Trancoa Chemical Corp.*, 303 F.2d 456, 461 (1st Cir. 1962); *National Labor Relations Board* v. *Houston Chronicle Publishing Co.*, 300 F.2d 273, 277-278 (5th Cir. 1962).[6]

In *Celanese*, the Seventh Circuit held that the court's function in reviewing the validity of Board findings in representation elections was to apply the substantial evidence rule as enunciated in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951). Recognizing that the Board had been granted "wide discretion" over representation procedures, the Seventh Circuit found (291 F.2d at 225):

> There is no conflict or contradiction between the substantial evidence rule determinative of the scope

[6] Compare *National Labor Relations Board* v. *Bata Shoe Co.*, 377 F.2d 821, 827-828 (4th Cir. 1967), *certiorari denied*, 389 U.S. 917, with *Schneider Mills, Inc.* v. *National Labor Relations Board*, 390 F.2d 375 (4th Cir. 1968).

of review and the principle whereunder the Board is entrusted with wide discretion in establishing the procedures and safeguards necessary to insure the fair and free choice of bargaining representatives as enunciated in National Labor Relations Board v. A. J. Tower Co., 329 U.S. 324, 330 (1946). These rules do not conflict because they affect differing spheres of activity. The Board's wide discretion lies in the initial promulgation of rules and regulations, while the court exercises its duties in reviewing decisions involving application of the Board's rules. Judicial review in these cases is not concerned with the wisdom of the Board's policy but must determine whether the record as a whole supports the findings and conclusions respecting compliance with the policies, rules, and regulations promulgated by the Board.

Unless or until Congress changes the language of the statute or the Supreme Court changes its interpretation of the application of the statute, this court is bound by the rule of the Universal Camera case.

Here, the court of appeals failed to address itself to the evidentiary findings of the Board in light of their substantiality on the record as a whole. Instead, the court concerned itself merely with reviewing the Board's exercise of discretion. In so doing, the court below deprived Petitioner of meaningful review of the factual issues determinative of whether certain misconduct had interfered with employee free choice.

a. Petitioner asserted that the Union's election eve leaflet, representing to the employees that "Vote 'no' and you will give up the only chance you may ever have to vote on your future," was a substantial misrepresentation of fact (*supra*, pp. 42-43). Under settled law, such misrepresentations made so late as to prevent a reply require setting aside the election. *Celanese Corp. of America* v. *National Labor Relations Board*, *supra*, 291 F.2d at 226; *National Labor Relations Board* v. *Houston*

Chronicle Publishing Co., supra, 300 F.2d at 278; *Hollywood Ceramics Co., Inc.*, 140 NLRB 221, 224 (1962). The Board, concluding that the language of the leaflet was "vague" and did not rule out the possibility of a future vote, found no misrepresentation (*supra*, pp. 42-43). The court of appeals did not attempt an independent construction of the leaflet, as other courts have done, to determine if the Board's construction was correct. *Celanese Corp. of America* v. *National Labor Relations Board, supra*, 291 F.2d at 226; *National Labor Relations Board* v. *Hobart Bros. Co.*, 372 F.2d 203 (6th Cir. 1967). *Cf. National Labor Relations Board* v. *Schapiro & Whitehouse, Inc.*, 356 F.2d 675, 678 (4th Cir. 1966). Rather, the court merely concluded that the Board in its conclusion had not abused its discretion (App. A, *infra*, p. 21).[7]

We submit that a proper review of the leaflet here would require a result contrary to that reached by the Board. A study of the words used in the leaflet can leave little doubt that the Union's intent was to coerce employees, unsophisticated in organizing tactics and the Act's provisions, into believing that they would never have another opportunity to organize. Such representation is false,[8] and could well have had an impact on voters who were undecided or wavering. Accordingly, under appropriate review standards, the election should be set aside.

b. Petitioner also asserted that a rumor circulated on the day of the election—that a highly respected supervisor had made threatening statements in favor of the

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[7] A reviewing court may find an incorrect judgment was made, but still find that the agency did not abuse its discretion. See *Dow* v. *Ickes*, 123 F.2d 909, 914 (D.C. Cir. 1941), *certiorari denied*, 325 U.S. 807.

[8] The Act provides only that an election may not be held within 12 months of a valid election. Section 9(c)(3). And, of course, other methods of obtaining representation exist in addition to the secret ballot election. *United Mine Workers* v. *Arkansas Oak Flooring*, 351 U.S. 62, 72 n. 6 (1955).

Union—had interfered with employee free choice in the election. Although the Board noted that at least two employees submitted affidavits affirming that the rumor was that the supervisor had said "if the union didn't come in the company would make it rough on us" (App. C, *infra*, p. 44; J.A. 68), it found instead that the rumor spread by a pro-union adherent was that the supervisor had said "the Employer would make it 'rough' on employees regardless of the outcome of the election" (App. C, *infra*, p. 46; J.A. 70).[9] The Board concluded that the rumor, as it found it, was not coercive. And the court, holding that it was a function of the Board to evaluate "the probable effect of the comment," agreed with the "Board's finding that this rumor was innocuous" (App. A, *infra*, p. 22).

We submit that a review of the substantiality of the Board's findings under the substantial evidence rule would have affected the outcome. Certainly, accepting, as the court did, the Board's finding as to what the supervisor was rumored to have said, the court could properly agree that the rumor would not likely have a coercive effect on the electorate. But had the court examined the record as a whole, it would have discovered that there was a direct conflict as to what the supervisor was rumored to have said, and that, contrary to settled law and Board Regulations, the Board had resolved this material factual issue against Petitioner without a hearing. *National Labor Relations Board* v. *Bata Shoe Co.*, 377 F.2d 821, 825 (4th Cir. 1967), *certiorari denied*, 389 U.S. 917, and cases cited therein; NLRB Rules and Regulations, § 102.69, 29 C.F.R. § 102.69.[10] Thus, review of

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[9] In finding the text of the rumor to include the latter language, the Board apparently credited, from its *ex parte* investigation and without a hearing, the statement of pro-union adherent Gordon Davis, who admitted spreading the rumor, over the affidavits of the employees.

[10] The Board's resolution of what the supervisor purportedly said is obviously material. The Board did not consider what effect the

the evidentiary basis for the Board's decision under the substantial evidence rule would have disclosed that the Board had erred and would have required that the case be remanded to the Board for a hearing.[11]

2. In rejecting Petitioner's request for production of all statements and affidavits obtained by the Board in its administrative overruling of Petitioner's objections to the election, the court of appeals erroneously applied a test which contradicts the principles of *Jencks* v. *United States*, 353 U.S. 657 (1957).[12] The court held that production of the statements was necessary only upon a showing by Petitioner that a hearing on its objections to the election was necessary—*i.e.*, a showing that substantial and material discrepancies of fact appeared in the Board's rulings on the objections as compared to evidence submitted by Petitioner (App. A, *infra*, p. 20). The proper test, as in *Jencks*, is whether the statements are relevant, competent, and crucial to the impeachment of the evidence relied upon by the government.

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rumor as related by the employees would have—*i.e.*, "if the union didn't come in the company would make it rough on us" (App. C, *infra*, pp. 45-46; J.A. 70); but threats of retaliation have in the past required setting aside an election. *National Labor Relations Board* v. *Staub Cleaners*, 357 F.2d 1, 2-3 (2nd Cir. 1966); *Home Town Foods, Inc.* v. *National Labor Relations Board*, 379 F.2d 241 (5th Cir. 1967); *National Labor Relations Board* v. *Tampa Crown Distributors, Inc.*, 272 F.2d 470 (5th Cir. 1959).

[11] The court further erred in finding no interference because some employees stated they were not influenced by the rumor (App. A, *infra*, pp. 21-22). One employee, however, did feel that "others may have been influenced" by the rumor (App. C, *infra*, p. 44; J.A. 68). In any event, the test of coercive effect is not subjective evidence, but the likely effect of the statement. *National Labor Relations Board* v. *Trancoa Chemical Corp.*, 303 F.2d 456, 461 (1st Cir. 1962).

[12] It is well settled that the *Jencks* rule is applicable to government civil actions in general, including, of course, NLRB proceedings. *Harvey Aluminum* v. *National Labor Relations Board*, 335 F.2d 749 (9th Cir. 1964), and cases cited at p. 752 n. 5; *Ra-Rich Mfg. Corp.*, 121 NLRB 700 (1958).

In *Jencks*, the Court held that the government must produce "relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial." 353 U.S. at 672. The Court found the production of the statements necessary to safeguard the right of the defendant to impeach evidence relied upon by the government and thereby to further its defense.[13]

Here, the *Jencks* rule is fully applicable although the Board refused to hold a hearing and therefore precluded the presentation of government witnesses for "testimony at the trial." The rationale of *Jencks* makes the production of statements here as necessary, if not more so, as in a trial. For the Board here relied solely upon the statements taken in an *ex parte* investigation to make its findings of fact and conclusions. Since Petitioner had no opportunity to cross-examine the affiants with regard to their statements, the only possible impeachment of the evidence presented was through the statements themselves.[14] The Board, having relied upon these statements as the evidence upon which to base its findings of fact, could not validly deny Petitioner access to this evidence for impeachment purposes. *Jencks*, *supra*, 353 U.S. at 670-672. *Cf. United States* v. *Reynolds*, 345 U.S. 1, 12 (1953).

Accordingly, Petitioner established that the statements were relevant, competent, and crucial to the impeachment of the evidence relied upon by the government, and the court below therefore erred under *Jencks* in refusing

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[13] 353 U.S. at 668-669: "the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purposes of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them and determine what use may be made of them. Justice requires no less."

[14] A study of the statements could reveal inconsistencies within a statement or between statements which could negative their value as probative evidence. See p. 10, *supra*.

Petitioner's request for their production.[15] Furthermore, as it is a common practice for the Board to determine objections to the election solely upon *ex parte* administrative investigations without a hearing (see *Howell Refining Co.* v. *National Labor Relations Board*, —— F.2d ——, 69 LRRM 2032 (5th Cir., Aug. 12, 1968)), the issue of whether the statements relied upon by the Board must be produced upon request is important in the administration of the Act.[16]

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[15] There is no merit to the "policy" relied upon by the court for declaring the statements confidential and privileged against disclosure—*i.e.*, "if an employee knows that statements made by him will be revealed to an employer, he is less likely, for fear of reprisal, to make an uninhibited and non-evasive statement." (App. A, *infra*, p. 20). The same is true when an employee is called to testify after having given a statement, but his statement is then revealed to the employer. *Ra-Rich Mfg. Corp.*, 121 NLRB 700 (1958). Where such statement itself is the sole evidence relied upon by the Board, the argument for producing it to the defending party is even more compelling.

Nor may the statements be withheld on the ground that Petitioner did not "proffer evidence establishing a *prima facie* case of 'prejudice to the fairness of the election.'" (App. A, *infra*, p. 19). *Jencks* granted an absolute right to the statements of witnesses relied upon by the government; therefore, Petitioner was entitled to all statements relied upon by the Board in rejecting Petitioner's objections to the election.

[16] The Board, affirmed by the court of appeals, also rejected Petitioner's subpoena of the Union's list of employee organizers (App. A, *infra*, p. 20; J.A. 135-136). This list was relevant to Petitioner's contention that an employee who engaged in electioneering in the voting line was an agent of the Union. Such conduct by an agent of one of the parties to an election requires overturning the election under applicable Board law. *Milchem, Inc.*, 170 NLRB No. 46, 67 LRRM 1395 (1968). Although Petitioner does not stress this point as a ground for granting certiorari, it requests that the issue be preserved for consideration on the merits if certiorari is granted.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH C. MCGUINESS
1750 Pennsylvania Ave., N. W.
Washington, D. C. 20006

FLOURNOY L. LARGENT, JR.
25 East Boscawen Street
Winchester, Virginia 22601

Counsel for Petitioner,
Intertype Company, A Division
of Harris-Intertype Corporation

Of Counsel:

VEDDER, PRICE, KAUFMAN,
KAMMHOLZ & MCGUINESS
1750 Pennsylvania Ave., N. W.
Washington, D. C. 20006

Dated: November, 1968

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11,561.

INTERTYPE COMPANY, a Division of Harris-Intertype Corporation,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Review of an Order of the National Labor Relations Board.

(Argued April 2, 1968. Decided August 23, 1968.)

Before SOBELOFF, BOREMAN and WINTER, Circuit Judges.

Kenneth C. McGuiness (Vedder, Price, Kaufman, Kammholz & McGuiness; and Flournoy L. Largent, Jr., on brief) for Petitioner, and Allison W. Brown, Jr., Attorney, National Labor Relations Board, (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and William J. Avrutis, Attorney, National Labor Relations Board, on brief) for Respondent.

SOBELOFF, Circuit Judge:

Petitioning for review of the Labor Board's order requiring it to bargain with an elected and certified union,[1] the Intertype Company, while admitting its refusal to bargain, mounts a two-fold attack upon the representation proceeding which culminated in certification. The Company contends that the quashing of two subpoenas precluded a complete review of the issues and that in any event the facts which appear on the existing record demonstrate that the Union's conduct prevented its employees from exercising a free choice in the election. We reject each of these contentions and enforce the Board's order over the Company's further objection that the order is overly broad.

The facts, as they bear on the present review, can be briefly stated. The Union initiated its organization drive in early May, 1965. During the campaign, but before the Union petitioned for a representation election, Intertype filed an unfail labor practice charge predicated on "underhanded" tactics allegedly employed by the Union in its effort to secure authorization cards. In January, 1966, the parties reached a settlement agreement pursuant to which the Union was to post notices advising employees at the Intertype plant that they would in no manner be coerced or restrained in the exercise of any right under the Labor Act.

Shortly thereafter, the Union petitioned for a representation election. The employer countered with a motion to dismiss the petition on the ground that the authorization cards used to show the requisite employee interest had been procured during the posting period and were consequently tainted. This objection, however, was ill-founded, for the accuracy of the Board's basis in ordering an election is of no concern to the employer.

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[1] International Union, United Automobile, Aerospace & Agricultural, Implement Workers of America, UAW, AFL-CIO.

It is well established that "[t]he Board's authority to conduct an investigation under Section 9(c) of the Act is in no manner dependent upon the [union's] showing of *prima facie* representative interest * * *. It is the election * * * which decides the substantive issue whether or not the union * * * actually represents a majority of the employees involved in a representation case." *NLRB* v. *J.I. Case Co.*, 201 F.2d 597, 599, n.3 (9 Cir. 1953); *Kearney & Trecker Corp.* v. *NLRB* 209 F.2d 782 (7th Cir. 1953). The requirement of a showing of interest serves the limited purpose of enabling the Board to determine whether the surrounding circumstances justify an election, thereby screening out obviously frivolous petitions. Accordingly, the courts have been uniform in holding that "the validity of the showing of interest is for administrative determination and may not be litigated by the parties, either Employer or Union." *NLRB* v. *Air Control Products of St. Petersburg, Inc.*, 335 F.2d 245, 250 (5 Cir. 1964); *NLRB* v. *Swift & Co.*, 294 F.2d 285, 288 (3 Cir. 1961); *Kearney & Trecker Corp.* v. *NLRB, supra; NLRB* v. *J. I. Case, supra.*

When the Regional Director properly rejected the employer's objection and ordered an election, the Company filed a motion to "Reopen the Hearing and/or for Reconsideration." The basis of this motion was that predictions made by Union leaders as to the details of the yet unannounced election order conveyed an impression of favoritism by the Board toward the Union. No allegation of actual favoritism or collusion has ever been made by the employer; it objects only to the suspected subjective impact upon employees who attended the meeting. After an *ex parte* administrative investigation, the Director denied the motion and held the election.

Although the Union won, the Company has refused to bargain with it or to supply it with relevant information. For these failures, the Board has found Intertype guilty of violating § 8(a)(5), 29 U.S.C.A. § 158(a)(5), and issued the order now before us.

In preparing to defend the 8(a)(5) charge below, Intertype caused sweeping subpoenas *duces tecum* to be issued on the Board's Regional Director and the Union's International Representative, demanding all files and memoranda pertaining to the election campaign and the Director's *ex parte* investigation and, in addition, a list of the Union's In-Plant Organizing Committee. The Trial Examiner quashed the subpoenas, thereby according to the Company, committing prejudicial error.

I

In support of its challenge to the Trial Examiner's action suppressing the subpoena served on the Regional Director, Intertype points to an inconsequential discrepancy in statements obtained by the Director in the course of his *ex parte* investigation and appearing in his report.[2] The Company does not contend that this discrepancy itself created an impression of partiality in the minds of the employees, but only that it cast doubt on the reliability of the statements upon which the Regional Director based his decision. This uncertainty, Intertype maintains, necessitates a full hearing. Moreover, according to Intertype's contention, were the Director compelled to conduct a hearing and to call as witnesses those employees upon whose affidavits he relied, he would then have to produce the requested documents for purposes of cross-examination by the Company. Labor Board Rules and Regulations, § 102.118. It is unreasonable, Intertype urges, to permit the Regional Director to avoid making these disclosures by conducting his investigation *ex parte*.

This court has held, however, that "there is no requirement, constitutional or otherwise, that there be a hearing in the absence of substantial and material issues

[2] The single discrepancy brought to our attention is that while some employees recalled references at the meeting to an election to be conducted "between the 2d and 9th of June," others stated in their affidavits that Union representatives announced that the election could be expected in "25 to 30 days."

crucial to a determination of whether NLRB election results are to be accepted for purposes of certification." *NLRB* v. *Bata Shoe Co.*, 377 F.2d 821, 826 (4 Cir. 1967). The burden lies upon the party seeking a hearing to proffer evidence establishing a *prima facie* case of "prejudice to the fairness of the election." *Bata Shoe, supra* at 826. Since time is often a critical factor in election cases, *NLRB* v. *Sun Drug Co.*, 359 F.2d 408, 414 (3 Cir. 1966), it is essential that representation petitions be processed expeditiously with a view to holding the election as soon after the filing of the petition as is reasonably possible. Thus, to insist that the Board conduct a plenary hearing for every objection raised during representation proceedings would, by encouraging dissatisfied parties to engage in this dilatory tactic, prevent the prompt disposition of election cases. Consequently, the courts have upheld the Board's practice of conducting administrative investigations when it appears that the factual issues involved are not of such magnitude that they can be resolved only after a full hearing. See *NLRB* v. *Sun Drug, supra; NLRB* v. *Joclin Manufacturing Co.*, 314 F.2d 627 (2 Cir. 1963).

Here, Intertype has failed to carry its burden. Acting upon the Company's complaint, the Regional Director interviewed two Company supervisors and a non-unit employee to whom he was referred by the Company, as well as other employees unidentified in the record, who had attended the meeting. At the conclusion of his investigation, the Director reported that those interviewed were unanimously of the impression that the information advanced at the meeting represented mere speculation of certain Union leaders based on past experience. To support his finding, the Regional Director pointed to the fact that the information was not completely accurate. Intertype, on the other hand, failed to produce a single witness at the unfair labor practice hearing to contradict the Director's finding. Nor has it offered a scintilla of evi-

dence suggesting collaboration between the Board and the Union. Consequently, we find no error in the Board's refusal to conduct a full evidentiary hearing on this point.

Since Intertype failed to establish its right to a hearing, the Trial Examiner properly quashed the subpoena served upon the Regional Director. The Labor Board's Rules and Regulations, §§ 102.117(b) and 102.118, provide that except for limited purposes when a hearing is required, investigative case files are confidential and privileged against disclosure. The Seventh Circuit has noted, in upholding this regulation that, "if an employee knows that statements made by him will be revealed to an employer, he is less likely, for fear of reprisal, to make an uninhibited and non-evasive statement." *NLRB* v. *National Survey Service, Inc.*, 361 F.2d 199, 206 (1966). The policy embodied in the rule is therefore strong and clear, and on the facts before us Intertype has failed to justify its avoidance.

Equally without merit is the Company's attack on the revocation of its subpoena calling for a "list of the names of the [union's] In-Plant Organizing Committee." [3] The Union, understandably reluctant to disclose the committee roster, offered to submit the committee list to the Trial Examiner and to answer questions as to whether particularly named individuals were on its committee. The Company, however, declined the offer. We fully agree with the Trial Examiner's conclusion that the procedure suggested by the Union would have sufficiently protected the employer's rights and that there was, therefore, no legitimate need to disclose the entire list.

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[3] The Company claimed the right to this information in order to establish that certain named employees whom it charged with circulating false rumors and with electioneering at the polls were, contrary to the finding of the Regional Director, members of the Union's Organizing Committee. The substance of these complaints is discussed hereinafter in Section II of this opinion.

II

Next, Intertype urges that certain pre-election events precluded its employees' exercise of a free choice in the election. This attack upon the validity of the representation election is predicated on three alleged irregularities. First, the employer cites a union handbill circulated the day before the election which stated:

> "The results of your decision will not be so simple. Vote 'no' and you will give up the only chance you may ever have to vote on your future."

Intertype emphasizes that regardless of how employees might vote this would not be their *only* chance to vote on their future. The employer reasons that the statement therefore constitutes a substantial misrepresentation. The Regional Director, however, concluded that the insertion of the word "may" "indicates that a future chance to vote is entirely possible." Cognizant of the "well rounded exposition of pros and cons of unionization" communicated by both parties, he found in the circular no justification for upsetting the election results.

As this court took occasion to note recently in *Schneider Mills, Inc.* v. *NLRB*, —— F.2d ——, —— (4th Cir. 1968), "whether a representation election has been conducted under conditions compatible with the exercise of a free choice by the employees, is a matter which Congress has committed to the discretion of the Board." We find no abuse of that discretion in this case.

Objection is also registered against a rumor, circulated by known union adherents, attributing pro-union statements to a particular, highly respected supervisor. The Regional Director found that an employee, Gordon Davis, had in fact made the statements to four employees immediately before the election. Investigation disclosed, however, that Davis was not an officer of the Union or on its Organizing Committee and that the Union was not responsible for his conduct. See *Manning, Maxwell & Moore* v. *NLRB*, 324 F.2d 857, 858 (5 Cir. 1963). More-

over, those who heard the rumor, the Company's own witnesses, testified that they were not influenced by it.

Again, evaluation of the probable effect of the comment, in light of the totality of circumstances surrounding the election, is a function of the Board. To hold that an improper comment by one not subject to the control of either party must necessarily invalidate a representation election would constitute an unreasonably strict standard that might well prevent the holding of a valid election. The test, as enunciated in the varicus circuits, is whether the rumor, even if improper, materially affected the election by precluding employees from exercising their own free choice. *NLRB* v. *Blades Mfg. Co.*, 344 F.2d 998, 1002-1004 (8 Cir. 1965); *NLRB* v. *Zelrich*, 344 F.2d 1011, 1015 (5 Cir. 1965); *Rockwell Mfg. Co.* v. *NLRB*, 330 F.2d 795 (7th Cir. 1964). The record readily supports the Board's finding that this rumor was innocuous.

Lastly, Intertype cites another episode—that while standing in line on election day, Hawkins, an employee, commented to his fellow employee Miller, "Why be up the creek without a paddle? They're going to win. You might as well vote yes." Hawkins was not a union agent and no one other than Miller heard the remark. This is too trivial to merit serious consideration as a ground for nullifying the election.[4]

III

The Board ordered the employer to

"1. Cease and desist from:

(a) Refusing to bargain collectively in good faith concerning wages, hours, * * *.

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[4] In its brief and at oral argument, the Company also relied on the "tainted" showing of interest and the impression of impartiality created at the Union meeting as factors contributing to the totality of circumstances preventing the exercise of free choice. For the reasons stated earlier in this opinion, we reiterate our conclusion that the Regional Director's findings to the contrary are amply supported in the record.

> (b) Refusing to furnish the Union with pertinent data concerning the employees in the unit, * * *.
>
> (c) In any manner interfering with the efforts of the above-named Union to bargain collectively with the above-named Company on behalf of the employees in the above-described unit."

The specific target of the employer's objection is subsection (c), which it deems too broad and not justified by what it calls a "merely technical" violation. We disagree; this conventional language is not too broad or unsuited to this case. The Board has wide discretion to effectuate remedies and to fashion orders. *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346, 349 (1953). The Supreme Court has stated the rule:

> "Having found the acts which constitute the unfair labor practice the Board is free to restrain the practice and other like or related unlawful acts. * * * The breadth of the order * * * must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past." *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 436, 439 (1941).

The Board's order will be *Enforced.*

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,561

INTERTYPE COMPANY, a Division of
Harris-Intertype Corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Review of an Order of the National Labor Relations Board

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THIS CAUSE came on to be heard upon the petition of Intertype Company, a Division of Harris-Intertype Corporation, for review of a certain order issued against it by the National Labor Relations Board on May 23, 1967, in proceedings before the said Board known upon its records as Case No. 5-CA-3620; upon the answer of the National Labor Relations Board and cross-application for enforcement, and upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the said petition of Intertype Company, a Division of Harris-Intertype Corporation, be, and it is hereby, denied; and that the said order of the National Labor Relations Board be, and it is hereby, enforced; and that Intertype Company, a Division of Har-

ris-Intertype Corporation, abide by and perform the directions of the Board in said order contained.

For the Court—by Direction.

/s/ Samuel W. Phillips
Clerk

Filed Aug. 23, 1968, Samuel W. Phillips, Clerk

A True Copy, Teste:

Samuel W. Phillips, Clerk

By /s/ Margaret P. Atkins
Deputy Clerk

APPENDIX B

DECISION AND ORDER

On January 26, 1967, Trial Examiner Frederick U. Reel issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief. A reply brief was filed by the General Counsel.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the Respondent's exceptions, the briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner and orders that the Respondent, Intertype Company, A Division of Harris-Intertype Corporation, Winchester, Virginia, its officers, agents, suc-

cessors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C.

FRANK W. MCCULLOCH
Chairman

JOHN H. FANNING
Member

HOWARD JENKINS, JR.
Member

National Labor Relations Board

(SEAL)

TRIAL EXAMINER'S DECISION

This proceeding, heard at Winchester, Virginia, on November 29, 1966, pursuant to a charge filed the preceding August 29 and a complaint issued October 12, arises out of a challenge by Respondent (herein called the Company) to the validity of the Board certification issued to the Charging Party (herein called the Union) following the latter's victory in a Board-conducted election. Upon the entire record, including all matters properly subject to official notice, and after consideration of the brief filed by the Company, I make the following:

Findings of Fact

I. The Business of the Company and the Labor Organization Involved

The Company, an Ohio corporation, engaged at Winchester, Virginia, in the manufacture and sale of matrices, annually ships products valued in excess of $50,000 to points outside the State and is engaged in commerce within the meaning of Section 2(6) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Unfair Labor Practice

A. *The Representation Proceeding*

The Union filed a petition for certification on March 14, 1966, thereby initiating a proceeding which led to an election held June 21, 1966, and won by the Union, 111 to 91, with 5 ballots challenged. The Company filed objections to conduct affecting the election, but the Regional Director on August 5, 1966, overruled the objections and certified the Union as the statutory bargaining representative of the Company's production and maintenance employees. The Company requested Board review of this action, but the Board denied review on September 1, 1966,

thereby setting the stage for the unfair labor practice proceeding which followed.

In that proceeding, discussed below, the Company made no attempt to relitigate most of the issues it had raised at various stages of the representation proceeding. Consequently, I pretermit discussion here of most of the numerous grounds advanced by the Company for discussing or setting aside the representation proceeding. The Company, of course, is free to ask the Board or subsequent reviewing authority to examine alleged errors in the representation case, but—presumably because the Company recognized that matters which it litigated before the Regional Director and as to which it did not dispute the facts recited in his various determinations were not subject to reexamination by the Trial Examiner—the Company pressed before me only issues not fully explored in the earlier stages of the matter.

B. *The Unfair Labor Practice Proceeding*

At the hearing in the unfair labor practice case, General Counsel introduced evidence, which the Company did not controvert, establishing the Union's certification and the Company's express refusal to bargain with the Union and to furnish certain data requested by the Union. General Counsel then rested.

The Company in preparation of its case had caused *subpoenas duces tecum* to be issued to the Regional Director and to an international representative of the Union. Both subpenas were quashed for reasons outlined below.

The subpena to the Regional Director called for "all files, documents, reports, memoranda, affidavits, notes, correspondence, and records pertaining to [the Region's] investigation or investigations" in the representation proceeding I granted General Counsel's motion to quash this subpena, on the ground that the matters subpenaed would not be relevant to any issue properly before me. The

Regional Director's investigation file is not properly part of the record in this proceeding (*Kearney & Trecker Corp.* v. *N.L.R.B.*, 209 F.2d 782 (C.A. 7)). The Company is free at subsequent stages to attack the validity of the Regional Director's rulings but not to probe into his files. Such files may well contain statements privileged against disclosure to the Company. *N.L.R.B.* v. *National Survey Service, Inc.*, 361 F.2d 199, 206 (C.A. 7); *Kaiser Aluminum & Chemical Corporation* v. *United States*, 157 F.Supp. 939, 945-946 (Ct. Cl.). The Company made no allegation or other showing that it had a special need for the materials subpenaed sufficient to overcome these considerations. Cf. *United States* v. *Reynolds*, 345 U.S. 1.

The Company's subpena to the Union's representative called for "all files, documents, notes, minutes, and agenda of meetings pertaining to the union organizing campaign after the filing of [the representation petition]" and for "a list of the names of the [Union's] In-Plant Organizing Committee." [1] The Company contended that matters

[1] This subpena was personally served on Sunday, November 20, and under the Board's rules a petition to revoke should have been filed on the fifth working day thereafter, which (because of an intervening holiday) would have been Monday, November 28. Sections 102.31(b), 102.114(a). As the hearing was scheduled for 3 p.m. on November 28 a motion to revoke at that time would have been timely. A late postponement of the hearing (issued November 23 but because of the intervening holiday probably not received until Friday, November 25) delayed it to 11 a.m., Tuesday, November 29. Under all the circumstances, and mindful of the provision the rules are to be "liberally construed to effectuate the purposes and provisions of the Act" (Section 102.121), I entertained the oral motion to revoke, and, as will appear *infra*, ultimately granted it. After the close of the hearing, the Company on January 3, 1967, filed a Motion to Reopen Record and to Rescind Revocation of this subpena, arguing that the motion to revoke was untimely. Before I acted on that motion, the Company on January 17, 1967, filed a Withdrawal of Motion, in which it indicated that it abandoned any contention that the motion to revoke was untimely although it reserved its right to argue that on the merits the subpena should not have been revoked. The Motion to Reopen and the Withdrawal of Motion are hereby incorporated into the record as Trial Examiner's Exhibits 1 and 2, respectively.

called for in the subpena would be relevant to a consideration of the issues it desired to raise in the unfair labor practice proceeding. In the colloquy between counsel for the Company, counsel for the Union, and the Trial Examiner, Company counsel pointed out that the identity of the members of the bargaining committee was material to certain of the matters investigated by the Regional Director. Union counsel responded that the Union would answer questions as to whether particular named individuals were on its committee and would turn over a list of committee members to the Trial Examiner, but would resist a general disclosure of the committee roster. The Trial Examiner upon this representation was of the view that the Company's rights in the matter would be fully protected in the manner suggested by Union counsel, and observed that Company counsel could call Union counsel as an adverse witness or could call some other witness competent to testify to these matters. The Company did not see fit to avail itself of the Union's offers.

With respect to that part of the subpena calling for the Union's files, the Company urged that this material would be relevant to the contention that the Union had been the beneficiary of special favors from the Regional Director with respect to notice of the election and notice of eligibility to vote therein. As to these matters, the propriety of the Regional Director's conduct, as set forth in his various rulings, may be subjected to further review by the Board and the courts, but no factual issue with respect thereto is open before me, and in any event the subpena as issued is far too broad for that limited purpose. I therefore granted the motion to revoke.

The Company then presented evidence as to only one matter,[2] an objection to the election based on unlawful

[2] The Company also requested that I take official notice of Case 5-CB-671, which I did. That matter arose on the Company's charge of unfair labor practices by the Union and was settled informally in an agreement which expressly recites that the Union

electioneering at the polls. This matter was included in the objections filed with the Regional Director, but he rejected it for failure of the Company to produce supporting evidence. At the hearing before me the Company claimed that it did not apprise the Regional Director of the names of supporting witnesses because the employee witnesses in question "refused to permit their names to be turned over to the Regional Office." This seems to me to be an insufficient basis for permitting the Company to litigate in the unfair labor practice proceeding a matter which should have been developed at the earlier stage. If the Company is prepared to subpena witnesses against their will in the later proceeding, the Company can just as easily identify them for the Regional Director at an earlier date. And if what really occurs is simply a change of heart on the part of the witnesses, so that they now appear voluntarily, this is something less than the degree of justification required to open to litigation an issue that should have been explored at the appropriate stage.

Realizing that reviewing authorities might have a different view from mine as to the propriety of permitting the Company to present its evidence on this issue, I took all the testimony proffered by the Company. It establishes that on the day of the election while a number of employees were in line waiting to vote, employee Hawkins, who had already voted, said to employee Miller, who was at the end of the waiting line, "Why be up the creek without a paddle? They're going to win. You might as well vote yes." No other employee heard what Hawkins said to Miller. The record contains no evidence that Hawkins was on the union committee. The Company so alleged in its objections to the election, but it made no

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does not admit violating the Act. Its relevance to the instant proceeding is explored in the Direction of Election, footnote 3. See also *N.L.R.B.* v. *J. I. Case Company*, 201 F.2d 597, 600 (C.A. 9); *N.L.R.B.* v. *White Construction and Engineering Co., Inc.*, 204 F.2d 950, 953 (C.A. 5); *Kearney & Trecker Corp.* v. *N.L.R.B.*, 209 F. 2d 782, 787-788 (C.A. 7).

effort to support this allegation although, as noted above, both the Trial Examiner and counsel for the Union suggested procedures to Company counsel under which he could have developed whether Hawkins was or was not on the committee. On this record, even assuming that the evidence offered by the Company is to be given full weight, the election should not be set aside.[3] The certification was therefore valid, and the refusal to honor it violated Section 8(a)(5) and (1) of the Act.

Conclusion of Law

The Company by refusing to bargain with the Union has engaged in an unfair labor practice affecting commerce within the meaning of Sections 8(a)(5) and (1) and 2(6) and (7) of the Act.

The Remedy

I recommend the customary remedy, directing the Company to cease and desist from its unfair labor practice, to bargain with the Union upon the latter's request, and to post appropriate notices. As to the scope of the order, see the language suggested in *N.L.R.B.* v. *Express Publishing Company*, 312 U.S. 426, 439.

Accordingly, upon the foregoing findings and conclusions, and on the entire record I recommend, pursuant to Section 10(c) of the Act, issuance of the following:

ORDER

Intertype Company, a division of Harris-Intertype Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively in good faith concerning wages, hours, and other terms and conditions of

[3] Even if Hawkins was on the committee, the episode is too trivial to warrant setting aside the election.

employment with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO, as the exclusive representative of the employees in the following appropriate unit:

> All production and maintenance employees at the Company's Winchester, Virginia, plant including library employees, dark room operators, punch specialists, set-up men, machine adjusters, and the lead girl, but excluding all office clerical employees, time study men, draftsmen, expediters, production control employees, data processors, and all guards and supervisors as defined in the Act.

(b) Refusing to furnish the Union with pertinent data concerning the employees in the unit, their classifications, job descriptions, rates of pay, and other terms and conditions of employment.

(c) In any manner interfering with the efforts of the above-named Union to bargain collectively with the above-named Company on behalf of the employees in the above-described unit.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named Union as the exclusive representative of all employees in the above-described unit, and embody in a signed agreement any understanding reached.

(b) Post at its office at Winchester, Virginia, the attached notice marked "Appendix." [4] Copies of such notice to be furnished by the Regional Director for Region 5, shall, after being signed by an authorized representative

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[4] In the event that this Recommended Order be adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

of the Respondent, be posted immediately upon the receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the said Regional Director, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.[5]

Dated at Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

> WE WILL bargain collectively, upon request, with INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AFL-CIO, as the exclusive representative of all employees in the certified unit described below concerning wages, rates of pay, hours of employment, and other conditions of employment and, if an understanding is reached, embody it in a signed agreement. The bargaining unit is:
>
> > All production and maintenance employees at our Winchester, Virginia, plant including library employees, dark room operators, punch special-

[5] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 5, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

ists, set-up men, machine adjusters, and the lead girl, but excluding all office clerical employees, time study men, draftsmen, expediters, production control employees, data processors, and all guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain collectively with the Union or in any manner interfere with the efforts of the Union to bargain with us, on behalf of the employees in the appropriate unit.

INTERTYPE COMPANY
(Employer)

Dated ---------- By ----------
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 6th Floor, 707 North Calvert Street, Baltimore, Maryland, 21202, Telephone 752-8460 Ext-2100.

APPENDIX C

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Decision and Direction of Election issued by the undersigned on May 11, 1966, a secret-ballot election [1] was conducted under his supervision on June 21, 1966, with the following results:

Approximate number of eligible voters	213
Void ballots	0
Votes cast for Petitioner	111
Votes cast against participating labor organization	91
Valid votes counted	202
Challenged ballots	5
Valid votes counted plus challenged ballots	207

Challenges are not sufficient in number to affect the results of the election.

Timely objections to conduct affecting the results of the election were filed by the Employer on June 27, 1966.[2] The Employer's six objections will be treated *seriatim.*

Objection No. 1

> On June 16, 1966, Petitioner distributed to eligible employees of the Employer a handbill (a copy of which is attached hereto as Exhibit A) purporting to be issued by employees of Employer and purporting to set forth certain policies of the Employer. The handbill was scurrilous and misleading and contained

[1] The unit is: "All production and maintenance employees at the Employer's Winchester, Virginia plant including library employees, dark room operators, punch specialists, set-up men, machine adjusters and the lead girl, but excluding all office clerical employees, time study men, draftsmen, expediters, production control employees, data processors, and all guards and supervisors as defined in the Act."

[2] The petition was filed on March 14, 1966. The undersigned will consider on its merits only that alleged interference which occurred during the critical period which begins on and includes the date of the filing of the petition and extends through the election. *Goodyear Tire and Rubber Company,* 138 NLRB 453.

material and substantial misrepresentations and inaccuracies.

In support of this objection, the Employer submitted a leaflet [3] which was distributed by the Petitioner to employees on Thursday morning, June 16, 1966. This leaflet, mainly in cartoon form, states in essence that employees were required to report to work regardless of their physical condition.

The Employer contends that the leaflet is factually inaccurate. Moreover, it creates the erroneous impression that employees were required to report to work despite their poor physical condition.

The investigation discloses that on Thursday, June 9, 1966, one week prior to the distribution of the aforementioned June 16, 1966, leaflet, the Petitioner distributed a leaflet [4] to employees in which it, *inter alia*, attacked the Employer's weekly sickness and accident insurance. This leaflet contained the following statement:

> While off sick or hurt, we were told to report back to work before a certain date or we would be replaced on our jobs.

Thereafter, the following day, on Friday, June 10, 1966, the Employer's division vice-president and plant manager spoke to all employees. His speech consisting of seven typewritten pages stressed the advantages the employees enjoyed in wages, benefits, working conditions and job security and urged the employees to vote "no". Although the Petitioner's leaflet of June 9, 1966, was not mentioned in the speech, the Employer's representative spoke in great detail of the benefits granted to employees who had been ill. He stated, in part:

> *For people who have been sick*—our practice has been to allow them to return to work in their old jobs and

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[3] Appendix No. 1. The Employer received a copy of the leaflet on June 16, 1966.

[4] Appendix No. 2.

to include the time before and after the illness in figuring vacation eligibility. There have been 14 people who have been off for sickness for continuous periods of two weeks or longer and returned to work in accord with this policy.

5. *Accident and Sickness Benefits*

Under accident and sickness benefits, you have:

—26 weeks of coverage for each disability.

—$40.00 per week maximum—$30.00 per week minimum.

—Special 6 week maternity benefit

I've heard it said that nobody has collected under the Accident and Sickness Benefits. For your information this is a deliberate falsehood. It simply is not true. Our records show that 25 people have filed and 24 have collected a total of $2,061.45 under this plan during the past year with one individual receiving $350.00. The other one is still being processed.

Actually—this is a pretty good package even though a year old and—no union was needed to obtain it.

Thus the Employer's representative in the June 10, 1966, speech answered at length the health condition statements contained in the Petitioner's June 9, 1966, leaflet. As to the Thursday, June 16, 1966, leaflet, the Employer had knowledge of it on the day it was distributed. The election was not held until Tuesday, June 21, 1966. Therefore the Employer had sufficient time to restate and amplify its views as to the issue raised by the Petitioner. Apparently, it chose not to do so.

The undersigned has considered the Employer's objection, the Petitioner's leaflets on June 9 and 16, 1966, and the Employer's speech of June 10, 1966, and concludes that both the Petitioner and the Employer attempted to present a certain issue in such a manner as to have its greatest appeal to the voters. The issue was vigorously

presented by both parties and the employees were apprised of all facts on the issue that either side chose to present in its behalf. The employees were in a position to and capable of evaluating the arguments presented, and in any event, the Employer had ample opportunity to make an effective reply to the objected-to leaflet. *Hollywood Ceramics Company, Inc.*, 140 NLRB 221. Accordingly, the undersigned hereby overrules Objection No. 1.

Objection No. 2

> On June 20, 1966, the day before the election herein, Petitioner distributed to eligible employees of the Employer a handbill (a copy of which is attached hereto as Exhibit B) purporting to set forth information pertaining to the election. The handbill contained material and substantial misrepresentations and inaccuracies and the timing of its distribution prevented effective reply by the Employer.

In support of this objection, the Employer submitted a 5-paragraph leaflet[5] which was distributed by the Petitioner to employees on Monday morning June 20, 1966, the day prior to the election. The Employer objects specifically to certain portions of this leaflet. Thus, the Employer objects to the following:

Paragraph 1

> . . . Up to now you haven't had the opportunity to decide anything except perhaps the right to quit or accept the decisions of the boss.

The Employer contends the above quote is ambiguous and inaccurate as the employees could and did express numerous complaints and that based upon such complaints the Employer often made changes in its policies.

The undersigned is of the opinion that employees working in a plant are the ones best qualified to evaluate an assertion that they were required to accept the Employer's decisions on virtually all matters. Accordingly, this portion of the objection is overruled.

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[5] Appendix No. 3.

Paragraph 2

> . . . When your boss, and his outside helpers, (lawyers, National Association of Manufacturers, Chamber of Commerce, public relations, etc.) talks about the payment of dues, your right to strike, the lack of benefits, and asks you to vote 'no', he does this so that he can continue to cast the only and deciding vote on your future.

The Employer contends that this paragraph is factually inaccurate as neither the National Association of Manufacturers nor the Chamber of Commerce participated in the campaign in any manner.

The undersigned is of the opinion that there is nothing objectionable in this typical campaign propaganda whether or not the Employer was aided in its campaign by the National Association of Manufacturers or the Chamber of Commerce. Accordingly, this portion of the objection is overruled.

Paragraph 3

> The boss knows that your 'yes' Vote will give you the continuing right to have a vote on how much dues you will pay—protect your right to strike—protect your right to file objections to his (the boss') decisions without fear of losing your job— . . . .

The Employer contends that the above quote is misleading as union dues are determined by the union's national convention and not the employees. Furthermore, the right to strike and file objections is a statutory right that can be exercised by employees with or without a union.

The undersigned has considered the above paragraph and finds that it is not objectionable. Although, as contended by the Employer, the national convention does fix the dues, it does so only to a limited degree. The national convention fixes the minimum dues only. Beyond this limitation the local unions have authority to set the dues of their members. Moreover, delegates to the national convention are elected by local union members.

Thus, indirectly the members of a local do exert power and have a voice in setting even the minimum part of the dues. In addition, a local can exonerate certain members from the payment of local dues. Furthermore, Virginia is a "right-to-work" state and an employee is not required to join a union unless he desires to do so. The Employer apprised the employees of this fact. Accordingly, this portion of the objection is overruled.

As to the other portion of the Employer's objection, concerning the right to strike and file objections, the Employer had informed employees that they could discuss grievances with their supervisors regardless of a union's certified representation status in the plant. The Employer added that if a union were certified, a union representative had the right to be present when the grievance was discussed. As to the other facet of this portion of the objection the undersigned is of the opinion that it is not misleading. Accordingly, this portion of the objection is overruled.

Paragraph 5

> The results of your decision will not be so simple. Vote 'no' and you will give up the only chance you may ever have to vote on your future.

The Employer contends that the above quote is the most objectionable part of the leaflet and a very substantial misrepresentation, that this election is not the only chance the employees can have to vote in an election and that if the employees vote "no", another election can be run 12 months later.

Although the Employer contends paragraph 5 to be the most objectionable part of the leaflet, the undersigned does not find the complained-of quotation to be a misrepresentation as contended by the Employer. In the first place the reference to ". . . vote on your future" is vague. Moreover, in the quotation referred to in paragraph 5 the use of the word "may" clearly indicates that a future

chance to vote is entirely possible even if the employees were to vote "no" in the coming election. Also, it is noted that another election would not be a certainty if the Petitioner lost. Prior to an election being held a union has to engage in a campaign, secure sufficient authorizations and then file a petition. Accordingly, this portion of the objection is overruled.

The undersigned has considered the leaflet, the Employer's contentions and the evidence and finds that the objected to leaflet does not afford any grounds for setting aside the election. The parties engaged in a campaign that encompassed several months. Both parties vigorously stressed those elements in dispute which they considered would be of the greatest advantage to them. Prior to the election the Petitioner distributed approximately 15 one-page leaflets and the Employer distributed four letters or leaflets, two were two pages in length and two were one page in length. In addition, the Employer, on March 17, April 20, May 20 and June 10, 1966, delivered speeches to the employees which were, respectively, 6, 3, 4 and 7 pages in length. In doing so the parties communicated to the employees a well rounded exposition of pros and cons of unionization and the employees were capable of making their choice. None of the allegations cited by the Employer warrant setting aside the election. *Hollywood Ceramics Company, Inc.*, 140 NLRB 221.

Objection No. 3

On June 21, 1966, the day of the election, certain employees who were known adherents of the Union and members of the UAW In-Plant Organizing Committee informed substantial numbers of employees that Supervisor Ed Batch, who is highly respected by the employees and who has been at the Winchester plant since shortly after it opened, had stated that the Union 'better get in or it would be hard on the girls' and had made other statements supporting Petitioner's cause. The statements attributed to Supervisor Batch were erroneous and the timing of their dissemination prevented effective reply by the Employer.

In support of this objection the Employer presented three rank-and-file employees, all of whom work in the library.[6] The first affiant states that on Monday, June 20, 1966, she was told by another female employee that Supervisor Edwin Batch,[7] general plant engineer, had stated that "if the union didn't come in the company would make it rough on us." The affiant told Supervisor Hoffman of Batch's alleged remark and stated that she didn't believe it. Hoffman made no reply. The employee states that the above statement had no effect on her vote because she did not believe the rumor; however, she thinks others may have been influenced.

The second affiant states that during the morning of June 21, 1966, another employee told her that Batch had informed Gordon Davis[8] that "the union had better get it or it would be hard on us girls." This witness also told Supervisor Hoffman of Batch's alleged remark. She believes that Hoffman later told her that Batch did not make the statement. However, she is not sure whether Hoffman so told her before or after the election She states she did not believe the statement attributed to Batch since he had been with the Employer for a number of years.

The third affiant states that during the morning of June 21, 1966, Gordon Davis told her that "Mr. Batch seems to think the union is going to get in and it will be a very good thing and that it would be rough if it does and rough if they don't for awhile." She states she did not tell her supervisor because she did not believe the

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[6] There are approximately 56 employees that work in the library which is part of the material control department. The library is supervised by D. Hoffman and his assistant D. Klein.

[7] Edwin Batch supervises approximately 14 employees in the engineering section and is in turn supervised by the plant superintendent. Batch works in the manufacturing department.

[8] Gordon Davis is a rank-and-file employee who works in the library as a set-up man.

statement attributed to Batch. She states further that many of the other employees in the library knew about the rumor.

Edwin C. Batch, the general plant engineer, denies that he made any of the statements attributed to him. However, he states that he "heard about the rumor", from Plant Superintendent James Scully, shortly before the election.[9]

Gordon Davis, a rank-and-file employee who works in the library as a set-up man, states that on the 14th or 15th of June he heard from another employee that Batch had said "that they (the company) would make it tougher on the employees whether the election was won or lost by the union." He states he told approximately four other employees about the above rumor.

Davis states he was not told by the Union to either start the rumor or to spread it. He further states he was not on the UAW In-Plant Organizing Committee, that he spoke to some employees requesting that they keep an open mind on the subject of unionization. However, he asked only one person to sign a union authorization card and attended only one union meeting as he lives approximately 40 miles from the plant.

C. E. Strickland, the Union's International Representative, states that Gordon Davis was not a member of his in-plant organizing committee nor was he aware of the rumor until after the election. He states the Petitioner did not make known the names of the organizing committee.

The Employer contends that because of Davis' known union affiliation and activity the spreading of the rumor by him had a definite effect on the outcome of the election.

The investigation discloses that Davis did tell four employees about the statement alleged to have been made by

[9] Batch could not fix the time precisely.

Batch. However, he denies that he started the rumor. The evidence further establishes that the Employer's three witnesses were not influenced by the statement attributed to Batch as they did not believe he would make the remark attributed to him.[10] It was further stated by one of the Employer's witnesses that when she confronted her supervisor with the rumor he made no reply. One of the other witnesses stated that her supervisor told her that rumor was not true although she is not sure if he told her this before or after the election.

Assuming *arguendo* that Davis did initiate the rumor and spread it, such conduct on the part of Davis cannot be attributed to Petitioner. The evidence establishes that Davis is a rank-and-file employee who, although a Union adherent, is and was not an officer thereof. Moreover, he was not outstandingly active in soliciting members in behalf of the Petitioner. The Petitioner states, and Davis confirms, that Davis never was requested to or directed to act as the agent of Petitioner, in any manner or for any purpose. Accordingly, the undersigned concludes that Davis is not an agent of Petitioner and that the Petitioner is not responsible for his conduct.

Furthermore, the undersigned is of the opinion that the thrust of Davis' remarks that the Employer would make it "rough" on employees regardless of the outcome of the election was a matter that the parties had thoroughly explored in their numerous appeals to the employees. Thus, the Petitioner contended that the advent of the Petitioner on the scene had improved the employees' working conditions and that the conditions would continue to improve if the Petitioner prevailed in the election. The Employer, on the other hand, enumerated the various benefits it had granted to the employees and stated that it would continue to improve the employees' working conditions, wages and benefits. Accordingly, in view of the above, and all

[10] One witness thought that other employees may have been influenced but had no evidence to support her belief.

the evidence adduced during the investigation, the undersigned is of the opinion that the employees were fully capable of evaluating Davis' remarks and hereby overrules Objection No. 3.

Objection No. 4

> On June 21, 1966, at about 1:45 P.M., during the course of the election, an employee who was a known supporter of the Union and a member of the UAW In-Plant Organizing Committee engaged in unlawful electioneering by urging an employee or employees, while waiting in line to cast ballots, to vote for the Union. The aforesaid electioneering took place within 10 feet of the election tables but out of sight of the Board agents and observers. The employees who engaged therein was neither in the line waiting to cast a ballot nor at a proper work station.

The Employer did not produce evidence in support of Objection No. 4. The undersigned, therefore, overrules Objection No. 4.

Objections Nos. 5 and 6

> As more fully set forth in documents heretofore filed with the Regional Director and the Board, the showing of interest supporting the petition was obtained through threats, harassment, restraint and coercion thereby precluding Employer's employees from freely and without interference deciding whether to show interest in a bargaining representative.
>
> As more fully set forth in documents heretofore filed with the Regional Director and the Board, Employer's employees have, by the manner in which the election petition has been processed, been given the erroneous impression that the Board and its officers and agents condoned improper practices of the Petitioner in the obtaining of an election and supplied it with advance information as to the arrangements for eligibility in such election, thereby destroying the required 'laboratory atmosphere' necessary to the proper conduct of an election.

These two objections concern matters which the Employer had raised prior to the representation hearing, at the representation hearing, and after the undersigned issued the Decision and Direction of Election. Thus, the Employer on March 30, 1966, filed a Motion to Dismiss Petition on the grounds that the interest in support of the petition was tainted by fraud and coercion. On April 7, 1966, the undersigned denied the Employer's motion. At the representation hearing, the Employer again raised the issue as to the validity of the Petitioner's showing of interest. The undersigned in a Decision and Direction of Election, issued on May 11, 1966, decided that based upon an administrative investigation the Petitioner had an untainted adequate showing of interest. Thereafter on May 20, 1966, the Employer filed a Motion to Reopen Hearing and/or for Reconsideration. This motion again attacked the validity of the Petitioner's showing of interest. In addition, the Employer alleged that certain events created an impression among employees that the Board and its agents did not have an impartial position in the coming election. The undersigned investigated the Employer's allegations and on May 31, 1966, issued an Order on Employer's Motion to Reopen Hearing and/or For Reconsideration and on Motion for Administrative Investigation in which he decided: (1) that there was no evidence that the Petitioner's showing of interest was tainted by forgery, and (2) denied the Employer's Motion to Reopen Hearing and/or For Reconsideration. On June 10, 1966, the Employer filed a request for review of the Decision and Direction of Election in which it appealed, *inter alia*, all the undersigned's rulings and orders on the Employer's motions and positions raised in this objection. On June 17, 1966, the Board denied the Employer's request for review. No new evidence has been presented by the Employer in support of Objections Nos. 5 and 6. Accordingly, they are hereby overruled.

As the undersigned overrules in their entirety the Employer's objections, the undersigned will certify the results of the election.

CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW-AFL-CIO, has been designated and selected by a majority of the employees of the above-named Employer, in the unit herein involved, as their representative for the purposes of collective bargaining, and that, pursuant to Section 9(a) of the Act, as amended, the said organization is the exclusive representative of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Dated at Baltimore, Maryland, this 5th day of August 1966.

JOHN A. PENELLO
JOHN A. PENELLO, Regional Director
National Labor Relations Board,
Region 5
707 N. Calvert Street, Room 652
Baltimore, Maryland 21202

APPENDIX D

TELETYPE RECEIVED

DATE: September 1, 1966
TIME : 8:55 a.m.

TO: JOHN A. PENELLO

RE: INTERTYPE COMPANY, A DIVISION
OF HARRIS-INTERTYPE CORP.
CASE NO. 5-RC-5520

IT IS HEREBY ORDERED THAT THE EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTORS SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE B, AND IT IS HEREBY DENIED, AS IT RAISES NO SUBSTANTIAL ISSUES WARRENTING REVIEW. BY THE BOARD.

JOHN C. TRUESDALE
NLRB WASHNGTON

sag

APPENDIX E

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), and Rules and Regulations of the Board are as follows:

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * *

(c) (3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

* * * *

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * *

NLRB RULES AND REGULATIONS

* * * *

SEC. 102.69 (c) If objections are filed to the conduct of the election or conduct affecting the result of the election, or if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall investigate such objections or challenges, or both. If a consent election has been held pursuant to section 102.62 (b), the regional director shall prepare and cause to be served on the parties a report on challenged ballots or objections, or both, including his recommendations, which report, together with the tally of ballots, he shall forward to the Board in Washington, D.C. Within 10 days from the date of issuance of the report on challenged ballots or objections, or both, or within such further period as the Board may allow upon written request to the Board for an extension received not later than 3 days before such exceptions are due in Washington, D.C., with copies of such request served on the other parties, any party may file with the Board in Washington, D.C., eight copies of exceptions to such report, which shall be printed or otherwise legibly duplicated, except that carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Immediately upon the filing of such excep-

tions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the regional director. A statement of service shall be made to the Board simutaneously with the filing of exceptions. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. The report on challenged ballots may be consolidated with the report on objections in appropriate cases. If the election has been conducted pursuant to a direction of election issued following any proceeding under section 102.67, the regional director may (1) issue a report on objections or challenged ballots, or both, as in the case of a consent election pursuant to section 102.62(b), or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election. In either instance, such action by the regional director may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, on the basis of a hearing before a hearing officer, designated by the regional director. If the regional director issues a report on objections and challenges, the parties shall have the rights set forth in subsections (c) and (e) of this section; if the regional director issues a decision, the parties shall have the rights set forth in section 102.67 to the extent consistent herewith

* * * *

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 759

INTERTYPE COMPANY, A DIVISION OF HARRIS-INTERTYPE CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15–23) is reported at 401 F. 2d 41. The Board's decision and order (Pet. App. 26–36) are reported at 164 NLRB No. 108. The underlying decisions in the representation proceeding (Pet. App. 37–50) are not officially reported.

JURISDICTION

The decree of the court of appeals was entered on August 23, 1968 (Pet. App. 24–25). The petition for a writ of certiorari was filed on November 20, 1968.

328-866—68

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly concluded that the employer's objections to a representation election did not warrant setting aside the election.

2. Whether, in the circumstances of this case, the Board properly quashed a subpoena calling for the affidavits and other documents obtained by Board personnel in the investigation of the case.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in the Appendix to the petition (Pet. App. 51–53).

STATEMENT

1. THE REPRESENTATION PROCEEDING

Pursuant to a petition filed by the Union,[1] the Board conducted a representation election among petitioner's production and maintenance employees (Pet. App. 28; J.A. 13)[2] which the Union won by a vote of 111 to 91, with 5 challenged ballots (Pet. App. 28; J.A. 54). The Company filed timely objections to the election, and presented evidence to the Board's Regional Director in support thereof (J.A. 56–58; see

[1] International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO.

[2] "J.A." refers to the joint appendix filed in the court below, copies of which have been filed in this Court.

Pet. App. 44). The Regional Director, after an administrative investigation, overruled these objections, and certified the Union (Pet. App. 37–49). Thereafter, the Board denied the Company's request for review of the Regional Director's action (Pet. App. 50). The facts with respect to the objections in issue here are as follows:

Petitioner objected to a handbill distributed by the Union on the eve of the election, particularly to its last paragraph:

> The results of your decision will not be so simple. Vote "no" and you will give up the only chance you may ever have to vote on your future. VOTE "YES" and you will assure your right to a continuing vote and voice to help decide your own future. [J.A. 60.]

Petitioner contended that the handbill contained "material and substantial misrepresentations and inaccuracies and the timing of its distribution prevented effective reply by the Employer" (J.A. 56). The Regional Director found that there was no misrepresentation, since the reference to "vote on your future" was vague, and the word "may" indicated that a future election was possible even if the employees voted "no" in the coming election. The Director also found that, because of the full exposition of the pros and cons of unionization in the campaign, the employees were capable of evaluating, and thus were not misled by, the handbill. (Pet. App. 42–43.)

Petitioner also alleged that, on the day of the election, pro-union employees had circulated a rumor that a supervisor had stated that the Union had "better

get in or it would be hard on the girls and had made other statements supporting [the Union's] cause." Petitioner charged that the statements attributed to the supervisor "were erroneous and the timing of their dissemination prevented an effective reply by the Employer." (J.A. 56.) In support of this objection, petitioner submitted the names of three employees who heard the rumor (Pet. App. 44). The Regional Director's investigation revealed that Gordon Davis, a rank-and-file employee, had told four other employees about the statement alleged to have been made by the supervisor, and that the three witnesses presented by petitioner, who had heard various versions of Davis' remark,[3] all asserted that they did not believe it to be true and thus it had no effect on their vote (Pet. App. 44–46). The Regional Director concluded that Davis' conduct in spreading the rumor could not be attributed to the Union since he was not a Union agent, and that, in any event, the employees were fully capable of evaluating Davis' remarks (Pet. App. 46–47).

2. THE UNFAIR LABOR PRACTICE PROCEEDING

After certification, the Union requested the Company to furnish certain data to be used in connection

[3] Two of the witnesses stated that the rumor was that, if the Union did not come in, the Company would make it rough on employees. The other witness and Davis stated that the rumor was that the Company would make it rough regardless of the outcome. (Pet. App. 44–45.)

Although one witness thought that other employees may have been influenced by the remark, she had no evidence to support her belief (Pet. App. 46, n. 10).

with bargaining (Pet. App. 29; J.A. 98–99). Petitioner declined to furnish the information and refused to bargain, for the purpose of obtaining judicial review of the certification (Pet. App. 28–29; J.A. 100–101).

After an unfair labor practice complaint was issued, petitioner obtained *subpoenas duces tecum,* directed to the Regional Director, calling for "all files, documents, reports, memoranda, affidavits, notes, correspondence, and records pertaining to [the Region's] investigation or investigations" in the representation proceeding (Pet. App. 29; J.A. 104). The Trial Examiner, upon motion by counsel for the General Counsel, quashed the subpoena on the grounds that the matters would not be relevant to any issue properly before him, that the Regional Director's investigative file was not properly part of the record in the unfair labor practice proceeding, and, in addition, that the Company had failed to show any special need for the materials sought (Pet. App. 29–30; J.A. 105–106, 111–112).[4]

The Board approved the Examiner's ruling quashing the subpoenas, upheld the validity of the certification, and concluded that the Company, by its admitted refusal to bargain, violated Section 8(a)(5) and (1) of the Act (Pet. App. 26, 33). The Board ordered the Company to cease and desist from its unfair labor practice, and to bargain, upon request, with the Union (Pet. App. 33–34).

[4] The Examiner also granted the Union's motion to quash a subpoena directing it to produce, *inter alia*, a list of the In-Plant Organizing Committee (Pet. App. 30–31).

3. THE DECISION OF THE COURT OF APPEALS

The court of appeals enforced the Board's order. It concluded that the Trial Examiner had properly quashed the subpoena directed to the Regional Director, since petitioner was entitled to statements obtained by the Regional Director in his investigation only if the persons giving the statements were called to testify; and that petitioner raised no issues which entitled it to a hearing (Pet. App. 18–20). The court also held that the Board properly concluded that neither the statements in the Union handbill nor the circulation of the allegedly false rumor warranted upsetting the election (Pet. App. 21–22).

ARGUMENT

1. Whether the Regional Director's action in overruling the Company's objections to the election is judged by an "arbitrary or capricious" standard, or by a "substantial evidence" standard (as petitioner contends, Pet. 7–11), the court below correctly sustained it. Since the handbill contained the word "may" and the pros and cons of unionization had been discussed by both the Company and the Union in the preelection campaign (see *supra,* p. 3), the Regional Director was justified in concluding that the handbill did not mislead employees into believing that, unless they voted for the Union at that time, they would never get another opportunity to select a representative.

Similarly, whether the Company's or Davis' version of his statement be accepted (see n. 3, *supra*), the Regional Director found, as the court below noted, that "those who heard the rumor, the Company's own

witnesses, testified that they were not influenced by it" (Pet. App. 22). In these circumstances, together with the fact that Davis spoke for himself and not as an agent of the Union, the court below correctly concluded that the "record readily supports the Board's finding that this rumor was innocuous" (*ibid.*).

2. Nor is there substance to petitioner's contention (Pet. App. 11–13) that it was entitled to the production of statements in the Regional Director's investigative file, under the rationale of *Jencks* v. *United States,* 353 U.S. 657. The *Jencks* decision merely requires the production of the statements of persons offered as witnesses at the trial. See 353 U.S. at 666–667. Here, there was no hearing, and, as the court below properly concluded (Pet. App. 19), petitioner raised no issues requiring one.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
ROBERT A. GIANNASI,
Attorney,
National Labor Relations Board.

DECEMBER 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968